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IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. PAULA COLE, Defendant-Appellant	Supreme Court No. 22-1581

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE PATRICK WEGMAN, JUDGE

APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 30, 2023

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CERTIFICATE OF SERVICE

On the 15th day of September, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Paula Cole, 438 Locust St, Waterloo, IA 50703.

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QUESTIONS PRESENTED FOR REVIEW

Are the elements of child endangerment satisfied when a single mother leaves her 12-year-old son in charge of babysitting his four sleeping younger siblings at 11 AM to go to the store to buy toilet paper and diapers?

Can a conviction for child endangerment stand when the State did not state an articulable risk to the jury?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Paula Cole requests pursuant to Iowa R. App. P. 6.1103(1)(b)(1), that this Court grant further review of the August 30, 2023 decision of the Court of Appeals affirming Ms. Cole's conviction for child endangerment. The Court of Appeals entered a decision in conflict with the Iowa Supreme Court by holding that the State presented a real and articulable risk to the jury when only speculative risks were asserted at trial. State v. Anspach, 627 N.W.2d 227, 232-233 (Iowa 2001).

Ms. Cole was convicted of child endangerment under Iowa Code § 726.(1)(a) and (8) (2021). On appeal, Ms. Cole argued the State failed to establish she had knowingly created a substantial risk of harm to her children. (Ms. Cole's Brief, pp. 23-40). The Court of Appeals affirmed, finding the children did not know how to contact their mother and had no emergency plan. (Opinion, p. 5-8). This finding is contradicted by key facts: Ms. Cole and her neighbor had an open-door policy for helping with the children, which the children were

aware of, and the children had a cell phone and knew how to contact their mother. (Jury Trial, 66:11-19; 59:4-8; 96:2-10; 103:18-104:1).). These facts, which were not addressed by the Court of Appeals, undermine its conclusion a substantial risk existed.

The Court of Appeals erred by holding that brief testimony about the nine-year-old's "relational issues" with her brothers was sufficient to establish Ms. Cole knew a substantial risk was present. The only testimony at trial regarding this issue was that "relational issues" existed. There was no evidence regarding their nature, length, or intensity. This information is not sufficient to determine whether Ms. Cole knowingly acted in a manner that created a substantial risk of harm to her children.

The Court of Appeals also erred by holding there was a real and identifiable risk, when the State relied on conjecture and fear at trial. While the risk need not be "likely, probable, or statistically significant," it must be real or identifiable as

opposed to speculative or conjectural. State v. Folkers, 941 N.W.2d 337, 339 (Iowa 2020). The State did not articulate or establish what the substantial risk of harm was or who the risk of harm applied to.

WHEREFORE, Ms. Cole requests that this Court grant further review of the Court of Appeals' August 30, 2023 decision.

STATEMENT OF THE CASE

Nature of the Case:

The Defendant-Appellant, Paula Cole, seeks further review of the Court of Appeals' decision affirming her conviction for one count of child endangerment in violation of Iowa Code § 726.6(1)(a) and (8) (2021),[1] following a jury trial in the Black Hawk County.

Course of Proceedings:

Ms. Cole generally accepts as accurate the Court of Appeals' recitation of the procedural history.

Facts:

On July 2, 2021, Ms. Cole lived in an apartment in Waterloo, Iowa, with her six children. She had four boys: D (age 12), Q (age 10), O (age 8), and I (age 5); and two girls: C (age 9) and S (infant). That morning, Ms. Cole woke up her two

[1] Ms. Cole was charged under Iowa Code § 726.6(1)(a) and (7). However, under the current statute subsection (7) addresses child endangerment resulting in bodily injury that does not result in a serious injury. Iowa Code § 726.6(7) (2017) and Iowa Code § 726.6(8) (2021) are identical.

oldest children, D and Q, and told them she was going to the store and put D in charge of watching his siblings. (Jury Trial, 100:21-22; 101:15-17). Ms. Cole took her youngest child, S (infant), with her to Walmart to get groceries at 11 A.M. (Jury Trial, 53:15-23; 40:8-12). Ms. Cole saw the children's father coming to the building as she was leaving. (State's Ex. A.) (12:02:14-12:02:24). Ms. Cole said the children's father needed some money to go to Casey's, and Ms. Cole gave him ten dollars. (State's Ex. A.) (12:02:30-12:02:42).

After Ms. Cole left, C and O started arguing because O ate C's leftovers. (Jury Trial, 94:5-8). C threatened to leave, D stopped C from leaving the apartment, and then D fell asleep. (Jury Trial, 102:7-20). After D fell asleep, C went outside to see if Ms. Cole had returned so she could address the fight C had with O. (Jury Trial, 94:5-8; 97:13-14). Q was asking C to come back inside and she refused to do so. (Jury Trial, 58:24-59:23). Q then went to his neighbor, Jonathan Wheeler's, apartment. (Jury Trial, 59:12-23). Wheeler testified he and his

wife had an open-door policy with Ms. Cole and "[a]ny time her kids needed us, they would just come over." (Jury Trial, 59:4-8). Wheeler indicated Ms. Cole did not need to tell him she was leaving because they had an open-door policy and the children knew they could come ask him or his wife for help. (Jury Trial, 66:11-19).

Wheeler tried to help get C (age 9) back inside the building. (Jury Trial, 60:23-25). According to Wheeler, C was stomping around and pacing outside the building. (Jury Trial, 61:3-6). Wheeler indicated C did not walk out into the parking lot very far and was close to the stoop near the front door of the building. (Jury Trial, 61:17-23). Wheeler could see C while she was outside. (Jury Trial, 64:8-13).

Wheeler let Q use his phone because Q was "freaking out" and Wheeler believed Q would calm down if he called 911. (Jury Trial, 64:21-24). It is unclear what Wheeler meant by "freaking out" because Q was not yelling or crying. See generally (State's Ex. C). Wheeler did not believe the children

were in danger and he did not believe the situation warranted a 911 call. (Jury Trial, 65:1-6). Wheeler told the dispatcher during the 911 call he was able to help the kids out when they needed it. (Jury Trial, 65:18-24). (State's Ex. C at 4:13-4:17).

When officers arrived, no children were running around the parking lot and none of the children had run away. (Jury Trial, 39:15-19). None of the children were bleeding or hurt. (Jury Trial, 39:24-40:2; 63:20-25). D woke up after the police arrived and before his mom got home. (Jury Trial, 105:10-13). D pretended to be asleep while the police were at the apartment. (Jury Trial, 103:6-9; 98:16-20).

C testified she gave Officer Bram her mother's phone number so he could call her. (Jury Trial, 41:3-7). Officer Bram indicated he did speak to C about her phone, but could not remember if he talked to her about the app she used to call her mother. (Jury Trial, 40:13-41:2). C testified she had a cell phone, she knew how to use it, she knew her mother's phone number and could call her using an app on the cell phone.

(Jury Trial, 96:2-10). C had called her mom before the police arrived and she called her again after the police arrived at the apartment. (Jury Trial, 96:11-20).

Ms. Cole left at 11, received a phone call at 11:30, and walked back into her apartment at 12:01:54. (Jury Trial, 80:11-14). (State's Ex. A, 12:01:54). Both officers involved in the case testified there is no law that establishes an age at which a child can be left home alone. (Jury Trial, 45:3-6; 56:15-17).

ARGUMENT

I. The Court of Appeals erred in affirming Ms. Cole's conviction for child endangerment because the State failed to establish Ms. Cole knowingly acted in a manner that created a substantial risk of harm to her children.

The elements of child endangerment are: 1) a person who is the parent, guardian, or person having custody or control over a child 2) commits child endangerment when the person 3) knowingly acts in a manner that creates a substantial risk to a child's physical, mental, or emotional health or safety.

Iowa Code § 726.6(1)(a) (2021). The marshalling instructions specified a child is someone under the age of 14. (App. p. 6).

A. The Court of Appeals erred in concluding Ms. Cole was creating a substantial risk because the children had an immediate safety plan and the children could contact Ms. Cole in an emergency.

Ms. Cole took appropriate steps to ensure her children would be safe and could contact her in case of an emergency before going to the store. Before going to the store, Ms. Cole woke up her oldest two sons, aged twelve and ten, to let them know she needed to go to the store and the twelve-year-old needed to watch his younger siblings. (Jury Trial, 100:21-22; 101:15-17; 80:5-8). D had watched his siblings before and knew if there was an emergency he could go over to the neighbor's house to ask for help. (Jury Trial, 101:9-17). Ms. Cole provided her children with a cellphone and they knew how to contact her. (Jury Trial, 96:2-10; 103:18-104:1). These facts demonstrate Ms. Cole took steps to prevent risk; this is the opposite of knowingly creating a risk.

The Court of Appeals did not acknowledge that Ms. Cole had an open-door policy with her neighbors, the Wheelers. (Jury Trial, 66:11-19). The Court of Appeals stated Ms. Cole did not ask her neighbor to watch the children that morning. Mr. Wheeler testified he, his wife, and Ms. Cole had an agreement where Ms. Cole's children could go over to their apartment if they needed anything while Ms. Cole was gone. (Jury Trial, 66:11-16). The children were aware of this policy and knew they could go to Wheeler's apartment if there was an emergency. (Jury Trial, 101:13-20). The Court of Appeal's conclusion there was no "immediate safety plan" for the children is directly contradicted by the fact the children all knew they could go to the neighbors' apartment for help. (Opinion, pg. 5). Importantly, Wheeler also testified Ms. Cole did not need to inform either himself or his wife when she was leaving. (Jury Trial, 66:11-16).

The Court of Appeals also found that none of the children's phones had service, the children could not explain

how to contact their mom, and dispatch gave Officer Shawn Bram Ms. Cole's number. (Opinion, pg. 3). While appellate courts must "view the evidence in the light most favorable to the prosecution [,] they must consider [a]ll the evidence when determining the sufficiency of the evidence to support a guilty verdict." State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). This includes evidence which is contrary to the verdict. Officer Bram did initially testify the children had at least one phone, they did not have service, and dispatch gave him Ms. Cole's phone number. (Jury Trial, 31:3-22). However, Officer Bram later testified he believed C gave him Ms. Cole's phone number and that was how dispatch was able to contact Ms. Cole. (Jury Trial Vol. 41:3-13). C also testified that she called her mom before the police arrived and called her again after the police arrived at the apartment. (Jury Trial, 96:11-20). The Court of Appeals did not mention this contradictory testimony, and instead recited Bram's initial incorrect statements.

The Court of Appeals also said Ms. Cole's statement that she "had no other way to the store" demonstrated she knew she was acting in a manner that created a risk and choosing to do it anyway. (Opinion, pgs. 6). This statement comes from a 50 second video where Ms. Cole is on the phone with another individual. (State's Ex. B). After saying "I didn't have no – no other way to the store" she said "I needed to get toilet paper and stuff, and I literally went there and came straight back . . . during the time I was gone they called the police because they were fighting." See generally (State's Ex. B). There is not enough context to her statement to determine what exactly Ms. Cole meant by not having another way to the store. It is unclear if she had to borrow someone's car or she needed to get to the store urgently to get toilet paper for her and her children. This statement does not imply that she knew she was putting her children at risk and there is not enough context from her statements that could support the Court of Appeals' assertion. At best it is speculation or conjecture.

The Court of Appeals failed to consider crucial evidence that was central to the arguments in this case. While the standard of review is deferential to the verdict, this does not give an appellate court a license to ignore evidence that undermines the sufficiency of the evidence. Robinson, 288 N.W.2d at 340.

B. The Court of Appeals erred in concluding Ms. Cole knew or should have known she was creating a substantial risk, because her twelve year old son had babysat the children before with no issues.

Ms. Cole did not knowingly act in a way that created a substantial risk of harm. The term "knowingly" as it relates to child endangerment refers to knowingly creating a substantial risk of harm, not simply knowing that they are acting in a specific manner. State v. James, 693 N.W.2d 353, 356 (Iowa 2005); State v. Millsap, 704 N.W.2d 426, 430 (Iowa 2005). In order to prove child endangerment, the State must present evidence that "the prohibited result may reasonably be expected to follow from the circumstances presented." State v.

Folkers, 941 N.W.2d 337, 340 (Iowa 2020). The State failed to do so.

The Iowa Department of Health and Human Services provides a series of questions to help parents determine when it is safe to leave a child home alone which is instructive when assessing Ms. Cole's decision. Denial of Critical Care, Iowa Dep't of Health & Hum. Servs, found at https://hhs.iowa.gov/child-abuse/what-is-child-abuse/denial-of-critical-care (last visited May 10, 2023). These questions are:

> Does the child have any physical disabilities? Could the child get out of the house in an emergency? Does the child have a phone and know how to use it? Does the child know how to reach the caretaker? How long will the child be left home alone? Is the child afraid to be left home alone? Does the child know how to respond to an emergency such as fire or injury?

Id.

Applying the principles underlying these questions demonstrates Ms. Cole reasonably believed she could safely leave her children home alone, with the oldest two children

supervising. There was no evidence her children had physical disabilities. While Q was diagnosed with autism, there is no evidence he was physically disabled by this. (Jury Trial, 86:10-12). There was no evidence he had behavioral issues that would make it difficult for D to take care of Q.

Officer Bram, C, and D indicated the children had a cellphone and the children knew how to use it. (Jury Trial, 40:13-18; 96:2-10; 103:18-104:6). Both C and D knew they could reach Ms. Cole by calling her on their phone. (Jury Trial, 96:2-10; 103:18-104:6). The evidence indicated Ms. Cole would not be gone long because she was going to the store to get diapers in the middle of the day. (Jury Trial, 53:15-23; 40:8-12). She left at 11:00, received a phone call at 11:30, and walked back into her apartment at 12:01:54. (Jury Trial, 80:11-14; State's Ex. A at 12:01:54).

There was no evidence the children would be afraid to be left alone. The children knew they could go to the neighbor if they had any problems because they did. (Jury Trial, 59:4-8;

66:11-19; 101:9-17). Q demonstrated he knew how to call 911 because he used Wheeler's phone to dial 911, even though Wheeler did not believe the situation warranted a 911 call. (Jury Trial, 65:1-6). Wheeler testified the primary purpose of calling 911 was to help Q calm down. (Jury Trial, 64:21-65:6).

Officer Bram got Ms. Cole's phone number from C, which demonstrates the children knew how to get in touch with their mother. (Jury Trial, 41:3-7). D had previously watched his siblings. (Jury Trial 101:9-17). There was no evidence he was unwilling to watch his siblings and there was no evidence presented that problems occurred when he babysat previously. In summary, application of the criteria designated by the Department of Health and Human Services establishes Ms. Cole reasonably believed it was safe to leave the children at the apartment on this occasion.

The Court of Appeals relied on C's "relational issues" to establish Ms. Cole knew that leaving her children home alone created a substantial risk of harm. (Opinion, pg. 6). Evidence

at trial indicated C was having relational issues with her brothers and she was having trouble with her emotional responses to situations. (Jury Trial, 79:25-80:2; 81:5-6). There was no additional evidence on this subject. The fact that C was having relationship issues with her brothers alone is not enough for to demonstrate that Ms. Cole knew she had created a risk of substantial harm. The State needed to present evidence that the subsequent events were reasonably expected to follow. Folkers, 941 N.W.2d at 340.

The State did not present evidence that described how C acted during an emotional outburst or if there was a plan to help C calm down. The State did not present evidence of how frequently these emotional outbursts occurred. The State did not present evidence that the children were arguing before Ms. Cole left. The State did not present evidence to show the kids previously got into fights while D babysat. The State did not present evidence that D had fallen asleep when he babysat his siblings before. The State did not present evidence that C had

a history of threatening to run away or running away. The State did not present evidence that the siblings regularly argued about food. The State did not present evidence of previous "emergencies" where the children needed to reach out to their neighbors. The State did not present evidence that demonstrated Ms. Cole should have reasonably expected this disagreement to happen. By all accounts, this was an unexpected and unusual event.

Because "knowingly" means she must know she was creating a risk, not merely knew she was committing the act that created the risk, Ms. Cole did not knowingly put her children at risk by leaving her children home together while she made a short trip to the grocery store for necessities. Because there was not sufficient evidence at trial to demonstrate Ms. Cole knew she was creating a risk, the Court of Appeals erred in affirming her conviction.

II. The State did not articulate what the risk was under these circumstances and no identifiable risk was presented to the jury.

The Iowa Supreme Court defined substantial risk in State v. Anspach. It is "unnecessary to prove that the physical risk to a child's health or safety is likely. Rather a showing that the risk is real or articulable will suffice." State v. Anspach, 627 N.W.2d 227, 232-233 (Iowa 2001). While the risk need not be "likely, probable, or statistically significant," it must be real or identifiable as opposed to speculative or conjectural. See Folkers, 941 N.W.2d at 339. In this case, the State did not present evidence of a real, identifiable, or articulable risk of harm.

The Court of Appeals did not address the State's failure to articulate an identifiable risk. At trial State argued there was no one at home that "could have prevented the emergency," the children had "no choice but to call 911", and D was "not able to prevent bad things from happening." (Jury Trial, 24:7-8; 24:24-25; 117:15-19). Iowa case law does not

hold a parent, guardian, or caretaker criminally liable if they are unable to "prevent bad things from happening." Most importantly, "bad thing" is not an articulable risk because it does not sufficiently notify a criminal defendant what the allegedly prohibited conduct entails. In this case, there was no emergency and no indication anything would have happened differently even if Ms. Cole had been home.

The State heavily relied on speculation, conjecture, and fear-based tactics to persuade the jury that nine-year-old C was at risk because she was walking around right outside her front door. For example, the State argued "We don't need to wait until there's an Amber Alert. We don't need to wait until that child is snatched up by a stranger, until that child is just gone and there's hundreds of people combing the streets looking for her." (Jury Trial, 126:23-127:2). These statements played on the jurors' fear, instead of relying on any articulable risk created by Ms. Cole. Anyone can engage in catastrophic thinking, but that does not mean those tragic possibilities are

real, identifiable, reasonably expected to follow, or even marginally likely to occur. Because the State did not define who the risk applied to or what the risk was, they did not meet present sufficient evidence to establish Ms. Cole knowingly created a substantial risk.

Like the State, the Court of Appeals also held Ms. Cole to a standard not articulated in Iowa law. The Court of Appeals found Ms. Cole "was the only adult who knew the children were alone in her apartment that morning." (Opinion, pg. 5). This does not establish Cole knowingly created a substantial risk of harm. Iowa law does not provide for a specific age at which parents can leave their children home alone. (Jury Trial, 45:3-6; 56:15-17). The Iowa Code does not place any additional conditions upon parents, such as notifying another adult that their child is alone, when they decide their children are mature enough to be left at home by themselves.

It is worth noting the Iowa legislature has defined what is necessary for an individual to be found guilty of child

endangerment due to lack of supervision in Iowa Code § 726.6(1)(d) (2021). An individual can commit child endangerment under this section when they willfully deprive a child of necessary supervision which substantially harms the child or minor's physical, mental, or emotional health. Id. (emphasis added). By the State's own admission "nothing bad happened." (Jury Trial, 128:5-9). There was repeated testimony from the State's witnesses that none of the children were injured, bleeding, or crying. (Jury Trial, 39:24-40:02; 63:20-64:4).

The State's argument relied upon an amorphous risk grounded in fear and conjecture. Iowa law requires that the risk be "a very real possibility of danger." Anspach, 627 N.W.2d at 233. It is unclear what exactly the risk was under these circumstances. It is easy to speculate and engage in catastrophic thinking, but evidence raising only "suspicion, speculation, or conjecture is not substantial." Leckington, 713 N.W.2d at 221.

Conclusion:

The Court of Appeals erred by affirming Ms. Cole's conviction. There was insufficient evidence to find Ms. Cole committed child endangerment even when viewing the evidence in the light most favorable to the State. Ms. Cole requests that this Court grant her application for further review, vacate her conviction, and remand for dismissal. Crawford, 972 N.W.2d at 199.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.49, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,850 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Ella M. Newell Dated: 9/15/23

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